Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

PATRICIO HOMERO SAENZ, JR.

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari

To The United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 28, 1996

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QUESTION(S) PRESENTED FOR REVIEW

1. Does the Court of Appeals violate Fifth Amendment due process by affirming a conviction after finding insufficient evidence to support the verdict under the district court's jury instructions?

2. Did the Sixth Amendment's "fair and impartial jury trial" clause require acquittal on appeal since a rational factfinder could not find guilt under the conjunctive instructions to the jury?

3. Is the proper standard 21 U.S.C. §§ 846 and 841(a)(1) or the trial court's jury instructions when measuring whether a rational factfinder could have found Petitioner guilty on the evidence?

4. Before appellate affirmance of Petitioner's conviction, was the prosecution burdened with proving all the offense's essential elements which the trial court described to the jury?

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This case's caption contains all parties' names to the proceedings in the court below of whose judgment review is sought.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

PETITION FOR WRIT OF CERTIORARI

Petitioner Patricio Homero Saenz (Saenz), Jr., respectfully prays a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The unpublished opinion of the U. S. court of appeals appears at this petition's appendix pages 1 to 48 (Pet.App. 1-48). The judgment and memorandum of the U.S. district court are also unpublished (Pet.App. 53-74).

BASIS FOR SUPREME COURT'S JURISDICTION

In this criminal case, the court of appeals entered its opinion on November 21, 1995. On December 29, 1995, the court of appeals denied a timely petition for panel rehearing (Pet.App. 49).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment in part reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ... nor shall any person be ... deprived of life, liberty, or property, without due process of law ....

The Sixth Amendment in part reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ... and to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

The U.S. district court had jurisdiction under 18 U.S.C. § 3231 because Petitioner was indicted for an offense against the laws of the U.S. in the western district of Louisiana's Lake Charles division.

On September 28, 1993, Saenz was so indicted only on count I (Pet.App. 50-52; 22R 1-15). It alleged Saenz and others violated the law by knowingly and intentionally combining, conspiring, confederating and agreeing together and with known and unknown persons to commit the following offenses against the U.S., to wit: to knowingly and intentionally import into the U.S. from the Republic of Mexico and to possess with intent to distribute in excess of 1,000 kilograms of marijuana, a Schedule I controlled

substance, and to knowingly and intentionally possess with intent to distribute in excess of 5 kilograms of cocaine, a Schedule II narcotic controlled substance, in violation of 21 U.S.C. 841(a)(1) and 952(a), all in violation of 21 U.S.C. 846 and 963.

On May 4, 1994, the jury found Saenz guilty (35R 1414, 1425-1427; 26R 720) by checking on its verdict, which read (Pet.App. 102; 27R 720):

> As to the charge contained in Count I, conspiracy to import into the United States from Mexico and possess with intent to distribute marijuana, and to possess with intent to distribute cocaine we unanimously find that PATRICIO HOMERO SAENZ, JR. is
>
> __√__ GUILTY

The district court denied Saenz' timely motion for acquittal after the Government rested (34R 1246-1249, 1237-1260; 35R 1262-1267). That court denied Saenz' motion for new trial or acquittal after ruling on June 14, 1994 (26R 820-825):

> The basis of Saenz' position is that there was insufficient evidence introduced at trial to convict him. ***** Based upon the evidence introduced at trial, this court believes that the jury reasonably could have found Saenz guilty of the lengthy conspiracy charged in Count I in this case beyond a reasonable doubt.

On August 11, 1994, the district court sentenced Saenz to the custody of the U.S. Bureau of Prisons for a term of 121 months as to count I and assessed a five years supervised release term, and $50.00 special assessment fee (Pet.App. 53-55; 2R 23-25; 28R 1106-1112), after ruling in its sentencing memorandum of August 11, 1994 (28R 1091):

> In the defendant's sixth objection [to the PSR], ... Saenz asserts that cocaine was never a part of his agreement with the Lopezes. There has been no evidence produced by the government to prove that the cocaine was within the scope of Saenz' agreement with Lopez, therefore the cocaine will not be included in the base offense level.

This appeal followed. Later in compliance with the November 21, 1995 opinion of the court of appeals (Pet.App. 47-48), the district court resentenced Saenz on February 15, 1996, to the same earlier sentence (Pet.App. 65, 73-74).

Under the trial court's jury instructions, the evidence is insufficient to sustain Saenz' conviction of the count I conspiracy both to import into the U.S. from Mexico and to possess cocaine and marijuana with intent to distribute. The court of appeals so found (Pet.App. 39).

In those jury instructions, over no party's objection (34R 1259-1260; 35R 1403), the district court conjunctively listed all required to be proven for the jury to convict Saenz (Pet.App. 83-90; 34R 1259-1260; 35R 1403; 26R 685-688, 673-694), saying:

> For you to find any defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt as to the defendant whose guilt or innocence is being considered:
>
> First: That two or more persons made an agreement to commit the crime of importation into the U.S. from Mexico and possessing with intent to distribute marijuana and possessing with intent to distribute cocaine as charged in the indictment; and
>
> Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose.
>
> One may become a member of a conspiracy without knowing all of the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.
>
> *****
>
> A conspirator is responsible for offenses committed by other conspirators if the conspirator was

a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of, or as a foreseeable consequence of, the conspiracy.

Then on this sufficiency issue, the court of appeals said (Pet.App. 34, 39-41, 43-44):

> Saenz was convicted of one count of conspiring to import and possess both marijuana and cocaine with intent to distribute. He argues that the Government failed to prove beyond a reasonable doubt that he participated in the cocaine portion of the conspiracy.
>
> *****
>
> The evidence that Saenz joined the part of the conspiracy involving marijuana clearly is sufficient. Although there is sufficient evidence to tie him to the schemes of the Lopez organization with respect to marijuana, we find that there is insufficient evidence to prove beyond a reasonable doubt that he was involved in or connected to the cocaine portion of the Lopez brothers' conspiracy. All of Saenz' transactions involved marijuana. While the evidence might allow speculation that he was implicated in the cocaine portion of the conspiracy or cocaine transactions, such speculation is not sufficient to support a guilty verdict. Nonetheless, as discussed below, the conspiracy conviction must stand.
>
> Anticipating that we might find the evidence as to the cocaine portion of the conspiracy insufficient, Saenz also contends that because the district court instructed the jury in the conjunctive regarding the marijuana and cocaine conspiracies, the evidence is

insufficient to support the conviction.[1] "The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, ... the verdict stands if the evidence is sufficient with respect to any one of the acts charged." Turner v. United States, 396 U.S. 398, 420, 90 S.Ct. 642, 654 (1970). As stated above, we believe the evidence is sufficient to show that Saenz participated in the marijuana portion of the conspiracy. Therefore, according to the rule in Turner, Saenz' conviction must be upheld.

*****

Griffin, however, teaches us that we are to presume that this did not occur. Instead, we are to presume that the jury based its decision on the evidence which proved beyond a reasonable doubt that the defendant participated in the particular object of the conspiracy. In the instant case, the jury found Saenz guilty of conspiring in regard to both marijuana and cocaine. Because either cocaine or marijuana satisfy the statute in question, and the evidence is sufficient to support the marijuana conspiracy, the facts of this case present a more compelling basis to sustain the conviction than did the facts in Griffin. Accordingly, we reject Saenz' due process challenge and affirm his conviction.

---

[1] Saenz cites a Texas case for the proposition that the jury should have followed the district court's instructions and thus, acquitted him for failure6 to prove that he was involved with both objects of the conspiracy. Although that may be the law in Texas, as set forth in the text, infra, due process does not require acquittal. In light of the Supreme Court precedent discussed in the text, we decline to adopt Saenz' argument.

REASONS FOR GRANTING PETITION

After a legislature proscribes conduct as a crime in the U.S.A., the judiciary has the responsibility to inform the criminal trial jury all the prosecutor must prove before an accused can be found guilty beyond a reasonable doubt. Those instructions become all the law of that trial court case. After being sworn to follow the law, the jury's role is to apply that law to the evidence and to determine whether or not the prosecutor's charges against the defendant are factually true. The informed jury can then render the fair and impartial trial guaranteed each accused by the Sixth Amendment only by following the trial court's jury instructions.

However, Fifth and Fourteenth Amendment due process requires a reversal of any jury conviction and an acquittal of the charge whenever the jury convicts an accused on a proof failure in spite of the clear requisites of the trial court's jury instructions. The underpinning of that constitutional rule was declared in In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Winship was

decided on March 31, 1970, after argument on January 20, 1970.

On January 20, 1970, the Court decided Turner v. U.S., 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970). Turner declared a sufficiency review doctrine that "conjunctive really equals disjunctive." Turner so held without any reference to any constitutional principle later announced in Winship.

On June 14, 1978, the Court decided Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978) and Burks v. U.S., 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). In Burks, the Court said, id. at 17, 98 S.Ct. at 2150 (footnote omitted):

> Obviously a federal appellate court applies no higher a standard; rather, it must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision. See Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). While this is not the appropriate occasion to re-examine in detail the standards for appellate reversal on grounds of insufficient evidence, it is apparent that such a decision will be confined to cases where the prosecution's failure is clear. Given the requirements for entry of a judgment of acquittal, the purpose of the Clause would be negated were we to afford the government an opportunity for the proverbial "second bite at the apple."

Neither Burks nor Greene discussed the continued vitality of appellate courts using the conjunctive doctrine of Turner.

The clashing principles from the Turner, Winship and Burks cases crashed against each other in Saenz' case in the courts below. Saenz contends the reign of the conjunctive-disjunctive sufficiency doctrine from Turner should now have already come to an end. Its internment needs to be declared by this Court. Then the bench and bar can view that portion of Turner in its historical context as a case time passed by.

Due process has an ever evolving meaning to the accuseds and courts across the U.S.

In spite of due process, strict stare decisis required the court of appeals to follow Turner and to affirm Saenz' conviction given the conjunctive jury instructions in both Turner and Saenz' case despite the Government's proof failure in the district court,

Turner was decided at a time before Winship, Burks and their sufficiency analysis and double jeopardy bar certain retrials. When Turner was decided, harmless error was the Government's failure to prove both prongs of the

dual manners of conviction which the trial court had required the jury to find before the jury could find defendant Turner guilty.

In nearly all criminal cases in federal and state courts across the U.S., the jury does not deliberate its verdict until after receiving all the applicable law and being told what the prosecution had to prove beyond a reasonable doubt before the jury could return a verdict finding the defendant guilty. Where such jury instructions are seriously erroneous to the defendant's disadvantage, the jury cannot a true verdict render on the facts and the law. Unless the defense waives such error, reversal for retrial often result. See Ratzlaf v. U.S., 510 U.S. ___, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994); Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990); Cheek v. U.S., 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

Saenz' conviction offers this Court a vehicle to overrule Turner. Fundamental now is declaration of such an end to a lawless era of over at least 25 years of jury and prosecution blunders being hidden behind appellate court

affirmances of criminal convictions despite proof failures of some of the essential elements which the trial court declared must be proven before the jury could convict the accused beyond a reasonable doubt.

Our republic is a democracy of law and order. Where the Sovereign's prosecutor fails to prove his or her case, the accused is presumed innocent and must be set free and vindicated of the criminal law violation. A citizen accused now is supposed to so benefit by acquittal in the trial court or later on appeal whenever the Government fails to carry its requisite proof burden beyond a reasonable doubt. Because Saenz has not received on appeal what all other not guilty appellants are constitutionally guaranteed, Saenz petitions is this final Court for his liberty and for a declaration of the end of the terrible reign of Turner. Only this Court can intern the continuing precedent value of Turner.

The court of appeals' opinion herein (Pet.App. 39-44) measured the sufficiency of the evidence not under the district court's conjunctive instructions to the jury, but merely against the disjunctive legislation proscribing Saenz'

conduct and the district court's imaginary jury instructions which were not but should have been given to explain all requisite disjunctive facts the jury had to find beyond a reasonable doubt before finding Saenz guilty.

After that appeals court's finding (Pet.App. 39) there is insufficient evidence to prove beyond a reasonable doubt Saenz was involved in or connected to the cocaine portion of the Lopez brothers' conspiracy, the court of appeals followed Turner v. U.S., 396 U.S. 398, 420, 90 S.Ct. 642, 654, 24 L.Ed.2d 610 (1970), and rejected Saenz' due process right to an acquittal herein. Since Turner did not address that constitutional issue, the court of appeals should not have ignored the interrelation of Saenz' Fifth and Sixth Amendment rights to obtain an appellate acquittal for Saenz' chosen jury was duty bound to acquit after fairly and impartially determining the lack of the requisite conjunctive factual elements necessary for conviction under the instructions received from the district court.

As applied herein, this Court's subsequent applicable decisions raise serious issue as to the remaining vitality of that portion of Turner upon which the court of appeals

relied to uphold Saenz' conviction and to overrule Saenz' point of error. That point read:

> Under the trial court's jury instructions about Count I, the evidence is insufficient to sustain Saenz' conviction of the conspiracy both to import into the U.S. from Mexico and to possess cocaine and marijuana with intent to distribute.

Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979) articulated (footnote omitted):

> After Winship the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilty beyond a reasonable doubt.

See also Sullivan v. Louisiana, 508 U.S. ___, 113 S.Ct. 2078, 2080-81, 124 L.Ed.2d 182 (1993).

The burden of proof is on the Government to prove each element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). An acquittal should follow insufficiency of such guilt evidence where any rational trier of fact could not find proof of the essential elements of the charged crime beyond a reasonable doubt ("subjective state

of near certitude"). Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Burks v. U.S., 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). Alternatively, the jury may only convict if there is an evidentiary certainty the defendant is guilty. Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990).

The established rule of pleading in indictments is such elements are to be alleged in the conjunctive, even though the statute is worded in the disjunctive. Crain v. U.S., 162 U.S. 625, 16 S.Ct. 952, 40 L.Ed. 1097 (1896).

In Griffin v. U.S., 502 U.S. 46, 112 S.Ct. 466, 468, 116 L.Ed.2d 371 (1991), the trial court instructed the jury permitting return of a guilty verdict on Count 20 if the jury found defendant participated in either one of the two alleged objects of the conspiracy: namely, impairing the efforts of either the Internal Revenue Service to ascertain income taxes or the Drug Enforcement Administration to ascertain forfeitable assets. The Griffin question presented for review was simply whether a general verdict of guilty under disjunctive circumstances such as existed there "is reversible." Id., at 468.

The appellate Griffin analysis based on the trial court's disjunctive jury instructions is inapplicable to the conjunctive jury instructions herein. Thus Griffin is inapplicable herein. To apply Griffin herein would extend Griffin, and would violate Saenz' Fifth and Sixth Amendment rights to constitutional due process and to be tried by an "instructed" jury and to have the evidentiary sufficiency reviewed on appeal only under the same law or legal standards as the jury was authorized to convict. Nothing less is demanded by the process due a jury's verdict and its review on appeal.

Review standards require a court of appeals to decide the evidence's sufficiency in light of and constrained by the four corners of the trial court's jury instructions. Otherwise, due process is denied. Dunn v. U.S., 442 U.S. 100, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979); Cole v. Arkansas, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1968); Kotteakos v. U.S., 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

The issue here partially is whether or not harmless is the lack of evidential support for the jury verdict's

conjunctive finding. Acknowledging Saenz' timely acquittal motions under Fed. R. Cr. P. 29(a), (b) and (c) (34R 1249; 26R 820-825; 27R 861), does he have a substantial right to an appellate acquittal for a fair and impartial jury would have been required to acquit Saenz after scrupulously following the trial court's instructions on what was required to find Saenz guilty exactly as charged in the indictment?

Since Saenz' jury was so instructed by the trial court, the issue here is partially whether or not an appellate sufficiency affirmance requires proof beyond a reasonable doubt that Saenz' conduct was not only within the "statutory definition of the crime" but also within that definition described by the court's jury instructions and by the Sixth Amendment's "jury verdict of guilty beyond a reasonable doubt." Sullivan v. Louisiana, 508 U.S. ___, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 1239 (1993).

Because the district court instructed that before returning a guilty verdict the jury must find Saenz conspired to import and possess cocaine and marijuana with intent to distribute, then it was necessary there be sufficient

proof of both conspiratorial objects to import and to so possess cocaine and marijuana. "Otherwise, a guilty verdict would be deemed contrary to the law and the evidence." Ortega v. State, 668 S.W.2d 701, 707 (Tex.Crim.App. 1984) (on rehearing) (footnote omitted).

> "In sum, there is no such thing as 'surplusage' in the part of the court's instructions to the jury which authorizes a conviction, and if the prosecutor believes that portion of the charge unnecessarily increases his burden of proof, it behooves him specially to request a charge which correctly allocates burden placed on him by law ...."

Id. at 707 n. 5.

A case analogous to Saenz' acquittal request herein is U.S. v. Ruiz, 986 F.2d 905, 909 (CA5 1993). There the court reversed Crawford's conviction as to 18 U.S.C. § 2114, saying:

> However, the USDC [district court] instructed the jury that defendants could only be convicted under Count one (the Section 2114 charge) if "he intentionally displayed ... [the gun] in some manner." The government objected to this instruction which had been requested by defense counsel. We are faced therefore with a unique situation in which the court's instruction was not raised by the evidence, and for the reasons discussed in the preceding paragraph, was not legally correct; but the jury proceeded to find Crawford guilty under this count in spite of the instruction. Under these circumstances, we conclude that the proper result is to reverse Crawford's conviction on Count one

on the narrow ground that the evidence was insufficient to support the jury's verdict under the instruction as issued by the USDC.

Due process requires Saenz' appellate acquittal since a fair and impartial jury was obligated to follow the district court's instructions and acquit Saenz for the failure of proof on the conjunctive "cocaine and marijuana objects of the conspiracy."

Reversal must follow for on review one cannot presume the jury based its verdict on a disjunctive sufficient prong or theory because both theories and prongs were conjunctively submitted to the jury on a single count but only one of multiple theories submitted to a jury is sufficient. The jury's only law is found in the jury instructions. The Saenz jury was oath bound to completely accept and to unwaveringly follow all that law in reaching its verdict. This is required by the Bill of Rights' constitutional guarantees to Saenz of the rights to due process and trial by fair and impartial jury.

With the conjunctive theories submitted to the jury herein (Pet.App. 87), the government offered no objection to the instructions as tendered by the trial court to the jury.

"In reviewing the trial court's instructions to the jury, it is this court's duty to consider the charge as a whole, and from the viewpoint of the jury." Byrd v. Hunt Tool Shipyards, Inc., 650 F.2d 44, 47 (CA5 1981) (Unit A). Therefore, the Government and appellate courts are bound by those instructions' terms. Thus, "both the government and the district court were mistaken about the law ... and therefore, Defendant's actions were not within the [applicable jury instruction's] definition of the crime". U.S. v. Self, 2 F.3d 1071, 1093 (CA5 1993).

The court's jury instruction (Pet.App. 75-101), as a whole, is a statement of the law which clearly instructs jurors as to the principles of law applicable to the factual issues confronting them. U.S. v. Pace, 10 F.3d 1106, 1120-21 (CA5 1993).

On appeal, the Government posited (Appellee's [Aee's] Brief 24-25):

> Even if a jury instruction is erroneous a conviction may be upheld if defendant failed to object on that ground. ***** The instruction favored the defendant. His failure to object to a favorable conjunctive jury charge should not operate to void his conviction which would be upheld if the charge had been disjunctive. ***** Absent sufficient evidence of Saenz' agreement

> to import and distribute cocaine the conviction should stand because there was sufficient evidence of his agreement with respect to marijuana.
>
> However, the trial court herein did not so instruct the jury.
>
> Finally, the jury was given no instructions on this theory, and we cannot at this late date reconstruct the government's case to affirm three convictions on a theory which was never adopted at trial.

U.S. v. Porter, 591 F.2d 1048, 1058 n. 6 (CA5 1979) [reversal since indictment failed to charge any crime].

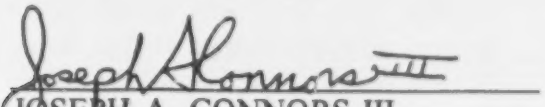
As viewed by the court of appeals (Pet.App. 39-44) and the Government on appeal, Saenz received due process of law when the jury convicted on evidence Saenz was guilty beyond a reasonable doubt of conspiring to import and to possess with intent to distribute marijuana. (Aee's brief 22). That is less proof than the trial court required for jury conviction, as the appeals court clearly recognized. Due process demands Saenz' acquittal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: March 28, 1996

Respectfully submitted by
Petitioner's Attorney,



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